

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STATE BUSINESS BROKERS, INC.,

Plaintiff-Appellant,

v

H & K ASSOCIATES, INC.,

Defendant-Appellee.

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UNPUBLISHED

April 13, 2004

No. 245248

Oakland Circuit Court

LC No. 02-037758-CK

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

In this action to collect commission pursuant to a listing agreement, plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition pursuant to MCR 2.116(C)(10)<sup>1</sup> and the trial court's denial of its request for summary disposition pursuant to MCR 2.116(I)(2). We affirm.

I. Facts and Proceedings

On March 1, 2000, plaintiff, State Business Brokers, Inc., entered into a listing agreement with defendant, H & K Associates, Inc., whereby plaintiff agreed to list for sale a restaurant in Royal Oak owned by defendant, Hi-Tops 10½ Sports Bar & Grill, as well as the real property where the restaurant is located. This agreement was valid until September 30, 2000. On October 15, 2000, the parties entered into a similar listing agreement for the same business and real estate. The pre-printed form agreement, valid until October 14, 2001, provided, in part:

OWNER agrees to compensate BROKER a fee amount equal to TEN (10%) of the Total Price including rental income during the lease term and any options

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<sup>1</sup> Defendant requested summary disposition based on MCR 2.116(C)(8) and (C)(10). The trial court's order does not state on what basis it granted defendant's motion for summary disposition. Nevertheless, because the trial court considered materials beyond the pleadings, it is clear that the trial court granted defendant's motion based on MCR 2.116(C)(10). *Kosmalski v St Johns Lutheran Church*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2004).

thereof set forth or agreed to by OWNER and Buyer, or a minimum of \$10,000.00 WHICHEVER IS GREATER, immediately, if any of the following occur:

- A. BROKER or his agents procure a buyer during the period of this agreement, and any extensions hereto, ready, willing, and able to purchase or lease the business and/or real estate on the price and terms indicated above or on other price and terms acceptable to OWNER. It is mutually agreed and understood that at this point BROKER has fulfilled his contractual obligation.

The listing agreement also specified that the business would be listed for sale for \$300,000, with a \$100,000 down payment and monthly payments of \$2,500 at nine percent interest, and that the real estate would be listed for sale for \$425,000, with a required down payment of \$100,000 and monthly payments of \$3,500 at nine percent interest.

During a meeting on April 8, 2001, plaintiff's president, Michael Kelly, and one of plaintiff's agents, Chris Kelly, provided to defendant's president, Hassan Hazamy, and his wife, Susan Hazamy, a Letter of Intent in which ARJIM, Inc. offered to purchase the business and real estate for the prices stated in the listing agreement. The Letter of Intent, signed by Gayle M. Zech as "President-Purchaser," stated, in part, that "[i]f the above [terms are] acceptable, a Purchase Agreement will be provided, subject to the approval of Buyer and Seller's attorney's [sic]." The Letter of Intent also contained a signature line for defendant's president. Zech, who also attended the meeting, offered to complete the transaction in cash after Hazamy questioned her financial ability to make the required payments.

Later that month, defendant's attorney sent plaintiff a letter stating that he had advised defendant's president not to sign the Letter of Intent because it did not address all of the terms and conditions of the sale. In the same letter, defendant's attorney requested that ARJIM, Inc. submit a formal offer to purchase the business and real estate. In response to this request, in June 2001, plaintiff proffered an unsigned document titled "Agreement for Purchase and Sale of Certain Assets of H & K Associates, Inc." that named ARJIM, Inc., as the proposed buyer of the business. The document contained various assertions by the purchaser on behalf of its shareholder, Zech, including a statement that the "[s]hareholder(s) represents that she is purchasing said business solely in her own behalf, that she has sufficient money for said purchase[,] and that she is not being financed by any illegal or undisclosed interest in this purchase." Plaintiff simultaneously provided defendant an additional unsigned document titled "Agreement of Sale." This document named Zech as the proposed purchaser of the real estate.

Thereafter, in July 2001, defendant's attorney requested financial information for "both of the purchasers." Plaintiff responded by sending defendant information concerning Zech's personal assets. Subsequently, Zech's attorney proffered a revised "Agreement for Purchase and Sale of Certain Assets of H & K Associates, Inc." This document listed Zebra Enterprises, Inc., and not ARJIM, Inc., as the proposed buyer of the business and was signed on September 7, 2001 by Zech in her capacity as the president of Zebra Enterprises, Inc. This document also contained terms of sale not found in the listing agreement, including terms that permitted the buyer to terminate the agreement within sixty days of execution if the property was not in satisfactory condition and that required the seller to execute a covenant not to compete for five years within five miles of the premises. Zech's attorney also provided defendant a revised "Agreement of Sale" that named Zebra Investments, L.L.C., rather than Zech, as purchaser of the

real estate. Zech signed this document as the “Managing Member” of Zebra Investments, L.L.C., also on September 7, 2001. Zech asserts that when she signed the documents she also provided a \$20,000 deposit (presumably as an earnest money deposit).

In a letter dated October 8, 2001, defendant rejected the offers by Zebra Investments, L.L.C., and Zebra Enterprises, Inc., and advised that it was no longer willing to consider offers from “any of the four people or entities that have previously presented these offers.”

On January 23, 2002, plaintiff filed suit against defendant, alleging that defendant breached the listing agreement by refusing to pay plaintiff the commission due after plaintiff procured agreements to purchase the business and real estate from Zebra Enterprises, Inc., and Zebra Investments, L.L.C., respectively.<sup>2</sup>

Defendant subsequently moved for summary disposition pursuant to MCR 2.116(C)(8) and 2.116(C)(10), arguing that plaintiff did not provide it any information concerning the ability of Zebra Enterprises, Inc., and Zebra Investments, L.L.C., (The Zebra Entities) to pay for the business and real estate, and that, therefore, plaintiff did not produce a “ready, willing, and able” buyer that entitled plaintiff to a commission. Additionally, defendant argued that because the terms of the offer made by The Zebra Entities differed from the terms in the listing agreement, these entities were not “ready, willing, and able” purchasers. Plaintiff responded that Zech, individually, was a “ready, willing, and able” purchaser, as reflected in the Letter of Intent initially submitted, and that there was a genuine issue of material fact on this question. Alternatively, plaintiff argued that defendant’s president acted in bad faith during the negotiations and unfairly prevented the sale, and that it was entitled to summary disposition in its favor pursuant to MCR 2.116(I)(2) on the basis of defendant’s alleged bad faith rejection of the purchase offers.

The trial court disagreed with plaintiff’s assertion that Zech, rather than The Zebra Entities, was the true purchaser, concluded that there had been no valid purchase offers reflecting the terms of the listing agreement, and granted defendant’s motion. The trial court also denied plaintiff’s request for summary disposition, stating that plaintiff’s claim of bad faith was irrelevant without a purchase offer that reflected the terms of the listing agreement. This appeal ensued.

## II. Standard of Review

This Court reviews de novo the trial court’s decision concerning a motion for summary disposition. *Taylor v Modern Engineering, Inc.*, 252 Mich App 655, 658; 653 NW2d 625 (2002). A request for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff’s claim. *Id.* To successfully oppose a motion on this basis, the nonmoving party must present substantively admissible evidence that demonstrates the existence of a genuine issue of material fact. *Id.*

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<sup>2</sup> The complaint does not specify whether, and if so, when a specific demand for payment of the commission was made.

### III. Analysis

Plaintiff first argues that the trial court improperly granted defendant's motion for summary disposition because plaintiff presented sufficient evidence to establish a genuine issue of material fact regarding whether Zech was a "ready, willing, and able" purchaser. We disagree.

We look to the terms of the listing agreement to determine whether the evidence supports the assertion that the broker earned its commission. *Hawkins v Smithson*, 181 Mich App 649, 652; 449 NW2d 676 (1989). The seller may not avoid paying commission by wrongfully refusing to complete the sale. *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957). The broker is not entitled to a commission, however, if the seller's refusal to enter into a purchase agreement constitutes a valid exercise of its rights and not a bad faith attempt to avoid payment of the commission. *Schostak v First Liquidating Corp*, 320 Mich 406, 409, 415, 417; 31 NW2d 673 (1948), overruled on other grounds in *Seelye v Broad*, 379 Mich 289, 291-292; 150 NW2d 785 (1967).

As noted above, plaintiff's complaint alleges that plaintiff procured purchase offers from Zebra Investments, L.L.C., and Zebra Enterprises, Inc. Defendant moved for summary disposition on the basis that these entities were not "ready, willing, and able" purchasers. The listing agreement afforded plaintiff entitlement to a commission if plaintiff produced a buyer that was ready, willing, and able to consummate a purchase under the terms described in the listing agreement or other terms acceptable to defendant. In response to defendant's motion for summary disposition, plaintiff argued that Zech was ready, willing, and able to purchase the restaurant. However, plaintiff did not present substantively admissible evidence demonstrating that *The Zebra Entities* were ready, willing, and able to purchase the real estate and business. Although plaintiff asserted in the trial court, and continues to assert on appeal, that Zech is the true purchaser, "the law treats a corporation as entirely separate from its shareholders, even where one person owns all the corporate stock." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 473-474; 666 NW2d 271 (2003), citing *Industrial Steel Stamping, Inc v Erie State Bank*, 167 Mich App 687, 692; 423 NW2d 317 (1988). Consequently, evidence demonstrating Zech's willingness, preparedness, and ability to purchase the property does not create a genuine issue of material fact as to The Zebra Entities. Additionally, because plaintiff did not claim in its complaint that it procured a purchase offer from Zech, evidence pertaining to Zech does not preclude summary disposition of plaintiff's claim.

In reply to defendant's brief on appeal, plaintiff argues that language contained in the "Agreement for Purchase and Sale of Certain Assets of H & K Associates, Inc." from Zebra Enterprises, Inc., creates a genuine issue of material fact. The document states:

21. For purposes of inducing SELLER to accept this Purchase Agreement, BUYER represents on behalf of itself and its owner-operator, Gayle M. Zech, that:

\* \* \*

C. . . . she is purchasing said business solely on BUYER'S behalf and not as agent of another party, that BUYER has sufficient money for said purchase and

that the purchase is not being financed by any illegal or undisclosed interest in this purchase.

\* \* \*

F. The shareholder of the BUYER, namely Gayle M. Zech[,], agrees to be personal guarantor as to the Security Agreement and Promissory Note.

Plaintiff did not assert this argument in the trial court, so it has not been properly preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nevertheless, we conclude that the document does not create a genuine issue of material fact because it pertains only to the purchase of the business and not the purchase of the real estate. Plaintiff has produced no substantively admissible evidence to demonstrate that Zebra Investments, L.L.C., was also able to purchase the real estate.

Additionally, as defendant argues, the terms of sale in the document submitted by Zebra Enterprises, Inc., differ from the terms in the listing agreement. “[A] broker does not perform in accordance with a listing agreement with the owner if the offer which he obtains from a proposed purchaser contains provisions other than those on which the owner has agreed to sell.” *Gardner v Batsakes*, 13 Mich App 454, 459; 164 NW2d 707 (1969). Here, the agreement proposed by Zebra Enterprises, Inc., contained provisions requiring defendant to sign a covenant not to compete and permitting Zebra Enterprises, Inc., to terminate the agreement within sixty days. This proposal was a counter-offer. *Id.* at 462 (Sullivan, J., dissenting), citing *Koster v Simon*, 339 Mich 556, 64 NW2d 607 (1954); *Sharrar v Nestle* 222 Mich 538; 193 NW 239 (1923). Accordingly, plaintiff has not raised a genuine issue of material fact demonstrating that The Zebra Entities were ready, willing, and able purchasers.

Plaintiff also asserts that the trial court erred by failing to grant summary disposition in its favor because defendant’s bad faith desire to avoid paying commission prevented completion of the sale. We disagree.

Rather than squarely addressing plaintiff’s assertion that defendant acted in bad faith, the trial court stated that bad faith is irrelevant in the absence of a purchase offer that mirrors the terms of sale stated in the listing agreement. Regardless of the propriety of the trial court’s statement, we agree with the result the trial court reached because plaintiff failed to produce substantively admissible evidence that demonstrated that defendant refused to consummate the sale in order to avoid paying plaintiff a commission. See *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 150; 624 NW2d 197 (2000) (stating that this Court will not reverse when the trial court reaches the right result for the wrong reason).

In support of its claim that defendant acted in bad faith, plaintiff presented excerpts of Hassan Hazamy’s deposition testimony in which he stated that he and his wife decided not to sell the restaurant to Zech or the relevant corporations because Zech did not have experience operating a bar and, in his opinion, could not successfully run the business. Hazamy’s deposition testimony does not support an assertion that defendant decided not to sell to these purchasers in an effort to avoid paying plaintiff a commission. At most, his testimony reflects that, because of Zech’s level of inexperience, Hazamy believed that Zech and the relevant corporations would not

be financially able to make the installation payments due under the proposed agreement because Zech could not successfully operate the business.

Plaintiff also attempts to support its claim by relying on handwritten documents that purportedly contain notes from defendant's attorney's conversations with Hassan Hazamy regarding Hazamy's decision not to sell to Zech or the relevant businesses. These handwritten documents do not constitute substantively admissible evidence that this Court may consider in addressing plaintiff's request for summary disposition. MCR 2.116(G)(6); *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 658; 653 NW2d 625 (2002); see also *Maiden v Rozwood*, 461 Mich 109, 123-124; 597 NW2d 817 (1999). Because plaintiff has not provided an affidavit or deposition testimony that identifies the documents, this Court cannot determine that the documents are what plaintiff purports them to be. Accordingly, these unauthenticated documents cannot support plaintiff's claim. Because plaintiff did not present substantively admissible evidence that supported its assertion that defendant did not consummate the sale in order to avoid paying a commission, the trial court did not err by denying plaintiff's request for summary disposition pursuant to MCR 2.116(I)(2).

Affirmed.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly